In The

Supreme Court of the United States

No. 78-653

PATRICIA H. BRENNAN AND J. PAUL BRENNAN,
d/b/a P. H. BRENNAN HAND DELIVERY,
Petitioners,

vs.

UNITED STATES POSTAL SERVICE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Patricia H. Brennan and J. Paul Brennan d/b/a P.H. Brennan Hand Delivery (hereinafter "Petitioners") respectfully petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this action on April 13, 1978.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Second Circuit (Docket No. 78-6002), is reported at 574 F.2d 712 (2d Cir. 1978) and is reproduced and annexed to this petition as Appendix A. The written but unreported opinion of the United States District Court for the Western District of New York (Civil Action No. 77-111), entered December 28, 1977, is reproduced and annexed to this petition as Appendix B.

JURISDICTION

The judgment and decree of the Court of Appeals for the Second Circuit was entered on April 13, 1978. On April 27, 1978, a petition for rehearing and/or for hearing *en banc* was filed in the Court of Appeals. The petition was denied on July 20, 1978, without opinion. (A copy of the Order denying Petitioners' application for rehearing and for hearing *en banc* is annexed to this petition as Appendix C.) After unsuccessfully applying to the Court of Appeals for a stay pending submission of their petition for writ of certiorari, Petitioners applied for a stay to Justice Thurgood Marshall. In a written opinion dated August 11, 1978, which is reproduced and annexed to this petition as Appendix D, Justice Marshall denied the application for a stay. This Court's jurisdiction is invoked uner 28 U.S.C. §1254(1) and Supreme Court Rule 19(1)(b).

QUESTIONS PRESENTED

The questions presented by this action are:

1. Does Article I, Section 8 of the United States Constitution permit Congress to exercise delegated power which meets *none* of the time-tested indicia of exclusivity through a federal, government-operated mail monopoly?

2. Does the legislative creation and exercise of exclusive federal governmental power, under the pretext of implementing delegated power which is not exclusive, violate the Tenth Amendment to the Constitution?

3. Do legislative and regulatory classifications which permit some mail carriers to deliver "letter mail" by exemption from the government letter mail monopoly, but which deny that right to Petitioners, violate the due process and equal protection guaranteed to Petitioners by the Fifth Amendment to the Constitution?

4. Is the Separation of Powers Doctrine violated by the implementation of the Private Express Statutes in a manner which allows the United States Postal Service, in the absence of statutory standards, to define the nature and scope of the letter mail monopoly and to determine whether and when operation of the Private Express Statutes may be suspended or repealed?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This case concerns the constitutionality of the federal letter mail monopoly, as created by certain statutes known collectively as the Private Express Statutes, which contain a civil component, 84 Stat. 727 (1970), 39 U.S.C. §§601-606, and a criminal component, 84 Stat. 778 (1970), 18 U.S.C. §§1693-1699, and the regulatory provisions which implement those statutes, 39 C.F.R. Parts 310 and 320 (1978), in light of Article I, Section 8, the Fifth Amendment and the Tenth Amendment of the United States Constitution. These statutory, regulatory and constitutional provisions are set forth in Appendix E of this petition.

STATEMENT OF THE CASE

A. *P. H. Brennan Hand Delivery.* Between March, 1976 and July 27, 1978, Petitioners operated a mail delivery service in downtown Rochester, New York, The service guaranteed same day delivery for all materials picked up from customers (the legal and business community) before noon, at a rate (10 cents per business-size envelope) which is considerably less than that charged by Respondent United States Postal Service (hereinafter "USPS"). As of July, 1978, P. H. Brennan Hand Delivery employed eight individuals on a full and/or part-time basis and carried an average of 3,000 pieces of mail per day to and from its 357 customers.

Petitioners did not maintain a separate office staff to receive individual delivery requests in the course of its operations, as do

many private courier services which compete regularly for the carriage and delivery of letter mail. See 39 C.F.R. §310.3(d). Nor did the messengers work for their customers as "employees", which would have permitted them to carry the letter mail of their "employers" outside of the government mails. See 39 C.F.R. §310.3(b). Rather, the service utilized its employee messengers who made rounds on a daily basis to determine whether customers had any documents or small packages for delivery and if so to deliver them. Each customer was assigned an account number to which a page was assigned in a day book that was carried by the messengers. The specific charge for each daily delivery was noted at the time of pickup and the account billed monthly; there was no monthly minimum charge.

Steadily, P. H. Brennan Hand Delivery increased its business and developed its reputation as a fast, efficient and inexpensive alternative to the USPS. The existence of the service became especially valuable for small businesses and law firms which could not afford to hire their own messengers to carry letter mail outside of the government mails; suddenly, they found that they could operate on a par with their larger competitors, redounding to the benefit of the community at large. For others, the service meant reliable delivery of time-sensitive materials at substantial savings.

B. *The Pleadings.* The USPS commenced this action in February, 1977, in the United States District Court for the Western District of New York, for a permanent injunction barring Petitioners from conducting their mail delivery service in violation of the Private Express Statutes. The Private Express Statutes, historical antecedents of which date back to approximately 1792,[1] purport to proscribe the private carriage and delivery of mailable materials which the USPS defines as "letter

[1]Act of Feb. 20, 1792, 1 Stat. 232.

mail",[2] by anyone or any business except the United States Postal Service.

On March 22, 1977, Petitioners filed an answer which, in substance, admitted the material facts alleged in the complaint, but, as a defense, urges that the Private Express Statutes are unconstitutional. Petitioners contend that those statutes, most recently enacted in 1970 and as presently implemented, are unconstitutional for two basic reasons. First, the statutes, as enacted, constitute an excessive and unlawful use of the postal power granted to Congress in the Constitution, and operate to unlawfully deprive the states and the people of the valid exercise of powers reserved to them by the Tenth Amendment. Second, the statutes have been implemented in a manner which manifests the unlawful and unconstitutional delegation of legislative power from the legislative branch of government to an agency of the executive branch, and which is so arbitrary, discriminatory and irrational as to deny the Petitioners the due process of law and equal protection provided by the Fifth Amendment.

C. *Lower Court Proceedings.* Following the submission of cross-motions for summary judgment on August 8, 1977, the District Court, on December 28, 1977, granted summary judgment to the USPS and denied similar relief to Petitioners. That court concluded:

> "The Private Express Statutes are a valid exercise of congressional power."

A temporary stay pending application to the Court of Appeals for the Second Circuit for a stay pending appeal was entered in

[2]See 39 C.F.R. Part 310.1(a) (1978), which describes a "letter" as "a message directed to a specific person or address and recorded in or on a tangible object . . ."

the District Court on December 29, 1977. On January 10, 1978, the Court of Appeals granted a further stay of the District Court's Order and Judgment until the argument of an expedited appeal on February 22, 1978. On the date of argument, the Court of Appeals extended the stay until determination of the appeal. On April 13, 1978, it affirmed the judgment of the District Court, rejecting all of Petitioners' constitutional arguments. Its most significant holding appears at 574 F.2d pp. 715-716:

> We conclude that the postal power, in conjunction with the necessary and proper clause, as interpreted by Chief Justice Marshall in *McCulloch*, authorizes Congress to exercise its power to the utmost extent. The monopoly which Congress created is an appropriate and plainly adapted means of providing postal service beneficial to the citizenry at large. Consequently, the Private Express Statutes are constitutional.

REASONS FOR GRANTING THE WRIT

I.

The Repressive Impact Upon the People and Business of This Nation Resulting from the Erroneous Constitutional Interpretation Adopted Below Is So Significant and Far-Reaching as to Invite Review by This Court.

A. *The Far-Reaching Implications Of The Existence And Constitutionality Of The Federal Letter Mail Monopoly Support, Rather Than Oppose, Review Of This Case.*

In submitting this petition, Petitioners are asking this Court for a construction of the Constitution which the Second Circuit has characterized, at least indirectly, as "far-reaching", "dislocating" and "revolutionary". See 574 F.2d at 718. There can be no question that any interpretation of the literal language of the Constitution, and especially the first interpretation of an enumerated grant of power to Congress, has far-reaching implications. It is difficult to imagine any government endeavor which touches the people and businesses of this country more frequently and more intimately than that of the United States Postal Service. But the far-reaching import and impact of this Court's determination, for the first time, of whether exercise of monopolistic governmental power over the mails is constitutional, supports rather than opposes the acceptance of this case by this Court.

B. *It Is The Continuation Of A Government-Operated Letter Mail Monopoly, And Not Petitioners' Construction Of The Constitution, Which Is Dislocating.*

When the Private Express Statutes were enacted by the First Congress under the new Constitution, they were enacted as a temporary extension of similar statutes which had been in

existence in America since 1782[3] and in England since at least 1710.[4] There was little discussion at the Constitutional Convention about the grant of postal power to Congress and even less discussion in the First Congress about the constitutional propriety of a government-operated mail monopoly.[5] It was continued simply because it had existed before.

There was no economic dislocation in 1789, for there was no private enterprise which was capable or willing to provide "nationwide" mail service.[6] However, private carriers continued to thrive in all areas where the government service did not extend and on all roads not officially designated as government post roads.[7] Several states continued their own internal delivery systems after ratification of the Constitution, just as they had throughout colonial times — in spite of the so-called monopolies which were operated by the Crown and by the Continental Congress under the Articles of Confederation.[8] Because there was no dislocation, and the presence of a governmental mail monopoly did not actually injure or infringe upon anyone's rights, there were no challenges to its constitutionality.

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[3]Act of Oct. 18, 1782, 23 J.C.C. 672-673.

[4]Act of 9 Anne, Ch. 10, § 2 (1710).

[5]See George L. Priest, "The History of the Postal Monopoly in the United States", 18 Journal of Law and Economics, 33, 47-51 (1973).

[6]Priest, *supra* at p. 49. The fact that private industry could not have attempted to supply the postal requirements of a frontier nation (574 F.2d at p. 715) might have justified the creation of a federal postal system for all who chose to use it. But the creation of a federal postal system is far different than a congressional declaration, unsupported by a grant of exclusive power, that the federal system shall be the only system and that federal carriers shall be the only carriers.

[7]Act of Feb. 20, 1792, § 16, 1 Stat. 232; Priest, *supra*, at p. 48 n. 71.

[8]Priest, *supra* at p. 43, n. 49; p. 45, n. 55 and p. 50, n. 79.

If there is a consistent theme of "dislocation" which has surfaced in subsequent postal history, it is the dislocation of private carriers who have offered ingenious, efficient and inexpensive alternatives to government mail service.[9] Time and time again, Congress has resorted to legislative amendments and revisions to quash private carriers in order to retain and expand its own "monopoly."[10] At present, dislocation policies continue, although in a much more discriminatory manner, working direct injury upon individuals such as Petitioners and indirect, if not direct, injury upon every person and business which is forced to accept government mail service with no choice of more acceptable and proficient alternatives.

C. *It Is The Second Circuit's Construction Of The Constitution, Rather Than Petitioners', Which Is Revolutionary.*

Petitioners' argument relating to the constitutional limitations upon the congressional exercise of power over the mails (refer to Point II herein) is one which adopts and adheres to the simplest, most fundamental principles of constitutional law. In straining to uphold the constitutionality of the Private Express Statutes, it is the Second Circuit which has adopted a novel and revolutionary view of the Constitution. That view is one which rejects the inherent constitutional distinction between "exclusive" and "non-exclusive" power, and permits Congress to determine, in its discretion, whether and when it will transform power which is not given to it exclusively into power which may be exercised through a government monopoly. It is, therefore, the act of delegation which that view emphasizes, rather than that which has been delegated. In essence, it is an

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[9]See generally, Priest, *supra* at pp. 57-60.

[10]*Id.* at pp. 64-65.

interpretation of the Constitution which, if carried to its logical extreme, would allow Congress to unilaterally render *every* concurrent governmental power exclusive.

The problem is and has been that the economic justification for, and the legitimacy and constitutionality of, the government mail monopoly has always been assumed but never really tested. In the few instances in which the constitutionality has been challenged, the response has been to: (1) affirm constitutionality without explanation;[11] (2) affirm constitutionality without analysis;[12] (3) affirm constitutionality by citing appealing dicta from inapposite cases[13] or (4) conclude that the age of the statutes alone makes them impervious to attack.[14] Such reactions, however misguided or incorrect, are not nearly as

[11] *United States v. Thompson*, 28 F.Cas. 97 (D.C. Mass. 1846).

[12] *United States v. Hall*, 26 F.Cas. 75 (E.D. Pa. 1844).

[13] *United States v. Black*, 569 F.2d 1111, (10th Cir. 1977), *cert. denied* ____ U.S. ____, 98 S. Ct. 1525, 46 U.S.L.W. 3601 (March 28, 1978). (Refer to Point IV herein).

[14] Both Solicitor General McCree and Justice Marshall, in connection with Petitioner's application for a stay, referred to *Myers v. United States*, 272 U.S. 52, 175 (1926) for the general preposition that an all-but-conclusive presumption of constitutionality attaches to Acts of the First Congress. It may be noted in this regard that the first congressional act to be declared unconstitutional was the Judiciary Act of 1789. *Marbury v. Madison*, 1 Cranch 137 (1803). In that opinion, Chief Justice Marshall wrote at p. 283:

> The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government of limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation.

dangerous in terms of potential application as the reaction and constitutional interpretation of the Second Circuit in this case.

Fortunately, the tide may be beginning to turn. In 1973, the President's Council on Wage and Price Stability recommended that the Private Express Statutes (and, therefore, the government's letter mail monopoly) be abandoned.[15] And in 1977 the Department of Justice issued a report entitled "Changing the Private Express Laws: Competitive Alternatives and the United States Postal Service." At the end of its lengthy and detailed investigation of the purported economic justification for a postal monopoly, the Department concludes at p. 31:

> In other instances where we have relied upon competition it has produced undisputed public dividends. Yet, competition has not been employed or permitted in the case of the country's second largest utility service. Even if this position were justified in the past (which we doubt), it is not justified today; and it should not be tolerated in the future absent very compelling public policy reasons.

In addition to its decision about the economic justification (or lack thereof) for the Private Express Statutes, the Department also refers to the legal origins of the mail monopoly and questions the appropriateness of blind adherence to past practices:

> Historical antecedents for the 'Postal Powers' are obscure, but it appears that they were included in the Constitution because operating a postal service had been considered a sovereign prerogative since the time of Elizabeth I. * * * There is little evidence that the Founding Father gave much thought to the ramifications of the Government-run monopoly of the postal business. (p. 2)
>
> Oliver Wendell Holmes once asserted that 'It is revolting to have no better reason for a rule of law than it was laid

[15] *Comments of the Council on Wage and Price Stability Concerning the Private Express Statutes*, Rate Commission Docket No. R76.4, January 16, 1978.

> down in the time of Henry IV. It is still more revolting that the grounds upon which it was laid down have long since vanished, and the rule simply persists from blind imitation of the past.' Mr. Justice Holmes was not speaking of the collection of laws generally referred to as the Private Express Statutes, though he might as well have been. (p. 1)

The import of the Justice Department study has direct bearing upon the present case, for it illustrates affirmative, official, probing reanalysis of that which has always been assumed to be not only correct, but *inviolate*. It is the responsibility of this Court, as the Constitution's final arbiter, to accept for review legal issues which require similar reanalysis, however difficult and however fraught with political ramifications. Petitioners respectfully submit that this is such a case.

POINT II

The Instant Case Warrants Review by This Court Because the Decision Below Fails to Recognize the Crucial Difference Between "Exclusive" and "Non-exclusive" Federal Power and the Proper Role of the Necessary and Proper Clause in the Implementation of Authority Which is Delegated to Congress in the Constitution.

At the heart of this case are two diametrically opposed views of the nature and limits of the permissible exercise of congressional power in general, and the nature and scope of the meaning of Article I, §8, Cl. 7 ("The Congress shall have power ... To establish Post Offices and post Roads") in particular. Petitioners have urged repeatedly that the American governmental system is one in which the Constitution, not the Congress, establishes the essential nature and scope of federal governmental power. This fundamental tenet is the predicate for Chief Justice Marshall's comments on the exercise of

enumerated powers by Congress in *McCulloch v. Maryland*, 4 Wheat. 316, 383 (1819):

> We admit, as all must admit that the powers of the government are limited and that its limits are not to be transcended.[16]

Petitioners recognize instances in which the power granted to Congress is indeed exclusive. In those instances alone is Congress permitted to "monopolize" the exercise of that power — if it chooses to do so. To illustrate, Congress may choose to "monopolize" all legislation dealing with the District of Columbia. U. S. Const. Art. 1, §8, Cl. 17. This is because Congress is *expressly* granted the "exclusive" power to deal with such legislation. Similarly, Congress may choose to "monopolize" the coinage of money. U.S. Const. Art. I, §8, Cl. 5. This is because Congress is delegated the power to coin money, and the Constitution *expressly prohibits* states from exercising a like power. U.S. Const. Art. I, §10. Furthermore, Congress may, if it chooses, "monopolize" the regulation of interstate commerce. U.S. Const., Art I, §8, Cl. 4. This is so because the Constitution grants Congress exclusive power to regulate commerce among the states, by *necessary implication*. The existence of a similar power in any state would be "absolutely and totally contradictory and repugnant" to the existence of the same power in Congress. See *The Federalist*, No. 32 (A. Hamilton). In each instance, the right to monopolize derives from and is predicated upon the existence of "exclusive" power.

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[16]Chief Justice Marshall also stated in *McCulloch*, at p. 384:

> Should Congress, in the execution of its powers, adopt measures which are prohibited by the Constitution; or shall Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land.

Furthermore, these three examples — exclusive power by express grant, exclusive power by prohibition and exclusive power by necessary implication — were the very examples used by Alexander Hamilton (*The Federalist*, No. 32), to describe those instances in which the Congress could exercise power exclusively.[17] Collectively, they demonstrate that it is the *Constitution*, not the Congress, that determines which of the powers delegated to Congress are exclusive; that is, which of the powers set forth in Article I, §8 can be exercised in an exclusive, (that is monopolistic) manner by the federal legislature.[18] If, and only if, Congress is granted exclusive power may it decide whether and when it will occupy a particular field exclusively. Stated differently, the only "ends" of government which may be monopolized by Congress are those which are vested in it solely and exclusively.

However, not all powers delegated to Congress in Article I, §8 are powers which are delegated exclusively to the federal government. For example, the constitution does not, in express or implied terms, grant Congress the exclusive power to tax. While congressional taxing power, to adopt the language which the Second Circuit cited (574 F.2d at p. 714) from *Gibbons v. Ogden*, 9 Wheat. 1, 196 (1824), "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than

[17]Each and every one of the exclusive powers granted to Congress in Art. I, Sec. 8 meets one of these three tests.

[18]It is also necessary to note the significant difference in the meaning and use of the words "express", "exclusive" and "plenary." "*Express*" or enumerated grants of power are set forth in Article I, §8 of the Constitution. Some of those "express" powers are "*exclusive*" powers (i.e., power to raise armies, power to regulate commerce among the states, power to adopt uniform bankruptcy laws) and some are not (i.e., power to tax). *Within* the scope (exclusive or non-exclusive) of power granted, Congress has "*plenary*" authority, pursuant to the "necessary and proper" clause. U.S. Const. Art. I, §8, Cl. 18.

are prescribed in the Constitution", it cannot be doubted that one of the "limitations . . . prescribed in the Constitution" is the absence of an *exclusive* grant of power to Congress to tax. Stated differently, and perhaps more appropriately for purposes of the present case, the exercise of congressional taxing power, even to its "utmost extent", does not and cannot encompass the federal monopolization of all taxing power. States do not retain taxing power because the Constitution declares that state sovereignty would be threatened without it, but because there is and must always be residual power to exercise whenever the grant of power to the federal government is not exclusive.[19]

Similar residual power is left as a result of the nature of the grant of postal power, for the reason that exclusivity cannot be demonstrated under any of the three tests of exclusivity discussed above. Just as the Constitution allows plenary exercise of the taxing power by Congress, but prohibits exclusive exercise or monopolization, it allows the exercise of the postal power only to the extent that enumerated power has been delegated to Congress. Most important, this conclusion is one which flows directly and inevitably from carefully devised restraints found within the Constitution itself.[20]

To permit the Congress the unrestrained and unfettered power to determine if and when the federal government may exercise

[19]Petitioners rely upon the Tenth Amendment in this regard, not because it acts to limit the exercise of power which is legitimately conferred, but because it acts to ensure that Congress may not exercise power which is not conferred upon it.

[20]Petitioners do not challenge the fact that USPS has plenary authority *within* the limits of its conferred powers, and can do all that is necessary *and* proper to establish and maintain a federal postal system. Nor do Petitioners challenge the fact that private mail carriers may be subject to federal regulation, insofar as their activities are in or affect interstate commerce. But those concessions are far different than a concession that Congress may decide that the federal government shall be the *sole* provider of mail services.

power exclusively, as has been done in this case, is to stand this country's constitutional system on its head. Such an interpretation of the Constitution admits of no constraints which could be placed upon the Congress' total assumption and assertion of governmental power.

The issue is *not* whether the establishment and maintenance of a federal postal monopoly is valid if, in the opinion of Congress, its existence is "necessary and proper" for the effective or beneficial implementation of the power to establish post offices and post roads. In reducing this case to an inquiry about legislative means, rather than properly focusing upon legitimate ends, the Court below plainly erred in its approach, for it showed no willingness to address the very clear threshold distinction between powers which are delegated exclusively to the Congress, and those which are granted to Congress but not to Congress alone. In citing and relying upon *McCulloch v. Maryland, supra,* in which Chief Justice Marshall gave a broad interpretation to the necessary and proper clause, the Second Circuit (574 F.2d at p. 714) accords no significance to the fact that Justice Marshall was interpreting an exclusively delegated power, and fails to recognize or emphasize the numerous qualifications the great Chief Justice set forth:

> We admit, as all must admit, that *the powers of the government are limited and that its limits are not to be transcended.* But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which *the powers it confers* are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. *Let the end be legitimate, let it be within the scope of the constitution,* and all means which are appropriate, which are plainly adapted *to that end,* which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional. (Emphasis supplied)

4 Wheat at 383.

The issue is whether the Constitution permits Congress to even consider the exclusive or monopolistic exercise of postal power, and the answer to that question is that it does not. Admittedly, Congress may exercise all power which is necessary and proper to implement the postal power which is conferred upon it, but the limits of that exercise depend, in the first instance, upon the scope and limits of the power conferred. If the underlying grant of constitutional power is not exclusive and, therefore, cannot support congressional monopolization, Congress may not alter the Constitution by determining, contrary to the "limitations prescribed in the Constitution". *Gibbons v. Ogden, supra,* that it is necessary and proper for the government to monopolize.

POINT III

The Instant Case Also Warrants Review Because of the Arbitrary, Irrational and Invidiously Discriminatory Manner in Which the United States Postal Service has Chosen to Define and Implement Its Own Monopoly.

Congress has not only exceeded its constitutional authority in enacting legislation which created a federal mail monopoly, but it has permitted the monopoly to be implemented by the USPS in a manner which violates the separation of powers doctrine as well as the due process and equal protection[21] rights guaranteed to Petitioners by the Fifth Amendment. To conclude, *arguendo,* that the creation of the monopoly was not an abuse of constitutional power, does not relieve the Court of its responsibility to ensure that the exercise of that power conforms, as it must, with Fifth Amendment protections. *Hoover v. McChesney,* 81 Fed. 473 (Cir. Ct. Ky. 1897). If, *arguendo,* the existence of a mail monopoly does not exceed the limitations of congressional power, but the monopoly has been implemented in a manner which

[21] See *Bolling v. Sharpe,* 347 U.S. 497 (1954).

violates Petitioners' basic rights to fair and rational treatment, then the Congress must be directed to correct those unconstitutional deficiencies.

A. *Petitioners' Equal Protection Claim*

The Private Express Statutes and the regulations which have been promulgated by the USPS to implement those statutes are replete with arbitrary, discriminatory and irrational classifications which allow some persons and businesses to carry mail which would otherwise be carried by the USPS and prohibit others from doing the same.[22] The most apparent classification is between those who carry "letter mail" and those who carry "non-letter mail." This classification sanctions the existence of parcel-carrying businesses such as United Parcel Service, air freight companies and many local delivery services. There is no question that such companies compete with USPS in those very areas in which it also provides service, and that such companies deprive the USPS of substantial amounts of revenue. Yet they are allowed to exist and compete, while Petitioners' business is not. The Second Circuit found nothing unconstitutional about this practice and concluded that "But here the classification is not directed against persons; rather it is based upon types of mail." 574 F.2d at p. 717.

However, the Second Circuit totally failed to recognize Petitioners' additional argument that the most perniciously

[22]Since equal protection claims under the Fifth Amendment receive the same treatment as claims under the Fourteenth Amendment, *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n. 2 (1975) the following statement from *Reed v. Reed*, 404 U.S. 71, 75-76 (1971) is apposite:

> The Equal Protection Clause . . . does, however, deny . . . the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' (case omitted.)

discriminatory classifications do not exist between "letter" and "non-letter" mail, but within the area of "letter mail" itself. Not a word is mentioned in that court's opinion about these classifications, which affect the Petitioners most directly, and which are those that arbitrarily create irrational distinctions between types of mail *and* between types of letter mail carriers.

To be more specific, the USPS (not Congress) defines a "letter" as "a message directed to a specific person or address and recorded in or on a tangible object. . . " 39 C.F.R. Section 310.1(a). The regulations thereafter list a number of "exceptions" to the definition of letter, 39 C.F.R. Section 310.1(a) (7), which allow private carriers of those "excepted letters" to operate outside of the USPS monopoly. While there is absolutely no apparent reason why the excepted letter materials are given special dispensation by the USPS, the fact remains that but for the regulatory exceptions the materials would be letters, and but for the exceptions carriers of those materials would be prohibited from operating.

In addition, USPS regulations provide exemptions for businesses which use their own employees to deliver their mail, 39 C.F.R. § 310.3(b), and for "special messenger" services. 39 C.F.R. § 310.3(d). Again, these exemptions permit private carriage and delivery of *letter mail* by hundreds if not thousands of businesses, in a manner which substantially decreases USPS revenues. If any rationale ever existed for the carrier exemptions, it has ceased to exist at the present time when the deficit-ridden USPS has operated, and is supposed to be able to operate, a priority express mail service.[23]

[23]Recent studies have begun to strip away the long held but untested myths that the Postal Service is a "natural monopoly" and that the primary rationalization for the continuation of the letter mail monopoly is to prevent "cream skimming" in high volume, high density urban areas. The 1977 Justice Department study states at page 8 that there is "virtually no credible evidence" that the Postal Service is in actuality a natural monopoly, i.e. that its operations demonstrate pervasive declining average costs per

Footnote continued on next page—

Without question, those who are similarly situated (persons and businesses wishing to carry and deliver letter mail) are not treated alike by the Private Express Statutes and USPS regulations. If a monopoly must exist, then let it exist for all types of mail and let no private carriers compete. Congress, and more particularly the USPS, should not be permitted to perpetuate the myth that there is, and must be, a letter mail monopoly, while at the same time carving out special exceptions which permit competition from certain select carriers in a manner which invidiously and irrationally discriminates against Petitioners.[24]

B. *Petitioners' Separation of Powers Claim*

While it is true that Congress must delegate power to the executive branch in order that laws which are enacted be implemented and administered within guidelines and standards established by the Congress, it is axiomatic that Congress may not, under any circumstances, abdicate or delegate powers and functions which are inherently and essentially legislative in nature. Accordingly, Congress may not divest itself of, or confer upon others, the essential ingredients of the legislative function,

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—Footnote continued from preceding page

unit of production to scale. That study also dispells the myth behind "cream skimming" (page 15) and finds a discernible relationship between the existence of the letter mail monopoly and what the Department of Justice described at page 14 as "the irrational allocation of benefits and losses accomplished through the Postal Service's pricing policies . . ." Certainly, the myriad exceptions, exemptions and suspensions which permit some private carriage of letter mail, but not by Petitioners, bear no substantial relationship even to these faulty justifications for the postal monopoly.

[24]"This Court need not in equal protection cases accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation." (cases omitted.) *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 n. 16 (1975).

to wit, the power to make, alter, suspend or repeal laws. Furthermore, it cannot confer upon others the power to make the basic policy determinations of when, and to whom, a law will be made applicable; nor may it allow delegated power to be exercised according to the mere will, or in the unregulated and unfettered discretion, of an administrative agency.[25] These rules are fixed and unalterable, no matter how beneficial the power delegated or beneficent the delegatee. *Panama Refining Company v. Ryan*, 293 U.S. 388, 420 (1934).

The Postal Service and not Congress has established the parameters and actual content of the letter mail monopoly. This has been accomplished by the creation of regulatory definitions of "letter" and "packet"; the Private Express Statutes have never contained definitions of those operative terms. The actual extent of the monopoly is determined by disregarding all materials which the Postal Service has chosen, in its sole discretion, to except by regulation from the definition. In this manner, the USPS is able to satisfy the needs and desires of special interests while retaining the major portion of its monopoly intact.

It is the Postal Service and not Congress which has determined, by regulatory fiat, to whom the letter mail monopoly (and its criminal sanctions) shall apply. This legislative feat is accomplished by additional regulatory exceptions which free certain types of businesses from the operation of the monopoly and allow them to compete for the carriage and delivery of letter mail. 39 C.F.R.§ 310.3.

Finally, and most important, the Postal Service has assumed, and exercised, legislative power to repeal the Private Express Statutes for certain types of letter mail and certain types of letter mail carriers. Through the use of the "suspension"

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[25]See *United States v. Robel*, 389 U.S. 258, 276 (1967) (concurring opinion).

power,[26] the Postal Service has repealed operation of the Private Express Statutes for all letter mail materials set forth at 39 C.F.R. § 310.1(a) (7) (i)-(vii), for the types of private carriers or businesses described at 39 C.F.R. § 310.3, and for the materials and operations described at 39 C.F.R. Part 320.

Even the Postal Reform Commission has recognized the illusory nature of the suspension power and the fact that its exercise has played a significant role in allowing the Postal Service to expand the limits of the monopoly:

> The suspension technique is a rather ingenious tool for achieving what appears to be the Postal Service's goal, i.e., gathering under its exclusive domain nearly all mailable matter. It permits the immediate adoption of a broad definition of the scope of its monopoly while keeping potential ire of mailers under control. No mailer can really complain so long as there is a suspension in force. If [the] Postal Service were to withdraw its suspension some years hence, it should cause no surprise when [the] Postal Service argues in court that the long standing administrative interpretation of the scope of the postal monopoly should be given weight.[27]

Thus, by administrative fiat, without any procedural safeguards and without the benefit of any meaningful limitations or standards prescribed by Congress, the Postal Service has taken unto itself, and has exercised, the inherently

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[26] 39 U.S.C. § 601(b) provides: "The Postal Service may suspend the operation of any part of this section upon any mail route where the public interest requires the suspension." The legislative history of 39 U.S.C. § 601 (See Priest, *supra* at p. 79 n. 228) establishes that the suspension power was not intended to be used in a manner which allows select private carriers to be free of the statutes' requirements.

[27] Postal Rate Commission, "Legal Memorandum of Assistant General Counsel, Litigation Division, Concerning the Role of the Postal Rate Commission in the Exercise of Legal Controls over the Private Carriage of Mail and the Postal Monopoly," Mail Classification Schedule, 1973, PRC Dkt. No. MC73-1, at 31 (July 31, 1974).

legislative function of deciding what materials lie within the boundaries of the monopoly, to whom the monopoly's prohibitions shall apply, and when the operation of the monopoly may be repealed. Clearly, such unprecedented, unregulated and unfettered power transcends that which is ordinarily necessary and incidental to the administration of a properly enacted law.

In unlawfully abdicating its most fundamental constitutional responsibilities, the Congress has allowed the plaintiff to shape, mold and alter postal policy according to its own definitions and perceived needs and desires. Consequently, the enactment and implementation of the Private Express Statutes has resulted in a patent violation of the separation of powers doctrine. For this reason alone, the statutes are void for:

> If this delegation is held valid, it would be idle to pretend that anything would be left of limitations upon the power of Congress to delegate its lawmaking functions.[28]

POINT IV

Denial of certiorari in *United States v. Black* should not prevent the granting of review in the instant case.

Petitioners are aware of the denial by this Court of a writ of certiorari in *United States v. Black*, 569 F.2d 1111 (10th Cir. 1977), *cert. denied* ____U.S.____, 98 S.Ct. 1525, 46 U.S.L.W. 3601 (March 28, 1978). That denial alone neither justifies, compels nor dictates denial of review in the present case. The rule is well-established that a denial of review by this Court is neither a decision on the merits nor, necessarily, an indication of whether the issues are worthy of review. A denial of a writ of certiorari means only that fewer than four justices were willing to vote for review of that case, on that record, at that time, and nothing more. Moreover, the petition in that case was filed late. Neither

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[28] *Panama Refining Co. v. Ryan*, *supra*, at p. 430.

the Court nor any justice filed an opinion outlining any reasons for the denial of the writ in *Black*.

More significantly, while the underlying issue of the constitutionality of the Private Express Statutes is present in both cases, there is a great difference in the manner in which the two cases were prepared, in the legal arguments which were raised and presented for consideration, *and* in the analyses adopted by the two Courts of Appeals. The Tenth Circuit's decision in *Black* relied solely upon judicial decisions in four cases, none of which involved the constitutionality of the Private Express Statutes at issue: *Ex Parte Jackson*, 96 U.S. 727 (1877); *Blackham v. Gresham*, 16 F. 609 (C.C.S.D.N.Y. 1883); *Williams v. Wells Fargo and Company Express*, 177 F. 352 (8th Cir. 1910); and *National Association of Letter Carriers, AFL-CIO v. Independent Postal System of America, Inc.* 470 F.2d 265 (10th Cir. 1972).

However, when the Second Circuit stated in its decision that "The constitutionality of the postal monopoly has been challenged rarely and never successfully," it cited *none* of the decisions relied upon by the Tenth Circuit. Furthermore, the Second Circuit's major holding rests squarely upon its interpretation of the language of the Constitution itself, and more precisely, upon an interpretation of the Constitution which permits the "necessary and proper" clause to be used in a way never intended — to rationalize congressional action which changes and enlarges the very nature of the power delegated.

In addition, the petitioners in *Black* did not mention, discuss, or rely upon the equal protection and separation of powers claims which have been analyzed and presented by the petitioners herein as an integral part of their constitutional attack. In *Black*, the Court was faced solely with the question of whether Congress had exceeded its powers in establishing a mail monopoly; it was not given the opportunity, which Petitioners are now presenting, to address the different but equally important question of whether the monopoly has been *implemented* in a manner which is constitutionally unacceptable.

The petition herein should not be denied simply because review by this Court was denied in *United States v. Black*.

CONCLUSION

For the foregoing compelling reasons, the Petition for Writ of Certiorari should be granted.

Dated: October 16, 1978
Rochester, New York

Respectfully Submitted,

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Of Counsel

APPENDICES

APPENDIX A

Judgment, Order and Decision of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS
For the Second Circuit

No. 741—September Term, 1977.
(Argued February 22, 1978 Decided April 13, 1978.)
Docket No. 78-6002

United States Postal Service,
Plaintiff-Appellee,

—against—

Patricia H. Brennan and J. Paul Brennan
d/b/a P. H. Brennan Hand Delivery,
Defendants-Appellants.

Before:

Friendly, Mulligan and Meskill,
Circuit Judges.

Appeal from a summary judgment entered in the United States District Court for the Western District of New York, Hon. Harold P. Burke, *Judge,* upholding the constitutionality of the federal postal monopoly.

Affirmed.

Gerald J. Houlihan, Asst. United States Attorney, Rochester, New York (Richard J. Arcara, United States Attorney, Western District of New York), *for Plaintiff-Appellee.*

James M. Hartman, Rochester, New York (Harris, Beach, Wilcox, Rubin & Levey, Rochester, New York, Michael C. Normoyle, of Counsel), *for Defendants-Appellants.*

Mozart G. Ratner, Washington, D.C. (Peter J. Carre, Washington, D.C.), *for Amicus Curiae, National Association of Letter Carriers.*

Mulligan, *Circuit Judge:*

The facts underlying this litigation are undisputed. Patricia H. Brennan and J. Paul Brennan, doing business under the name of P. H. Brennan Hand Delivery Service (the Brennans), have conducted since March, 1976 in downtown Rochester, New York, a service delivering for compensation letters and small to medium size parcels. They guarantee same day delivery in Rochester for all materials picked up from customers before twelve o'clock noon at a rate which is less than that charged by the United States Postal Service (USPS). On February 23, 1977 USPS brought a civil action in the United States District Court for the Western District of New York seeking permanent injunctive relief prohibiting the Brennans from continued violations of the Private Express Statutes which proscribe the private carriage and delivery of "letters."[1] On March 22, 1977 the Brennans filed an answer which in substance admitted the material facts alleged in the complaint but as a defense urged that the Private Express Statutes were unconstitutional. Cross

[1]39 U.S.C. §§ 601-606; 18 U.S.C. §§ 1693-1699.

motions for summary judgment were filed and on December 27, 1977, United States District Judge, Hon. Harold P. Burke, found that the defendants' contentions were without merit. He denied the defendants' motion for summary judgment and granted the government's motion for summary judgment. The Brennans appealed. On January 10, 1978 this court granted a stay of the district court's order and judgment until the argument of this appeal. At that argument on February 22, 1978 this court extended the stay until the determination of the appeal. The judgment of the district court is hereby affirmed and the stay in this matter is vacated.

I

Under the "Private Express Statutes", Congress has granted the United States a monopoly on the conveyance of "letters or packets" and has precluded competition by private express. *National Ass'n of Letter Carriers* v. *Independent Postal System of America,* 470 F.2d 265, 267 (10th Cir. 1972). Appellants' primary position is that the Constitution did not grant exclusive power to Congress to operate a postal system and that the Private Express Statutes are not "necessary and proper" to execute the constitutional power to establish post offices and post roads.

The Constitution does not expressly give Congress "the sole and exclusive right and power" to establish and regulate the carriage of mail as did the Articles of Confederation.[2] However,

[2]Compare United States Constitution, Art. I, § 8, cl. 7, "The Congress shall have Power . . . To establish Post Offices and post Roads," with The Articles of Confederation, Art. IX, "The United States in Congress assembled shall also have the sole and exclusive right and power of . . . establishing and regulating postoffices from one State to another, throughout all the United States . . . ."

the postal power, like all other enumerated powers of Congress, "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution." *Gibbons* v. *Ogden*, 9 Wheat. 1, 196 (1824) (Marshall, *C.J.*) (commerce clause). Moreover, the Constitution grants Congress the power to enact all laws it deems necessary and proper to execute its power to establish post offices.[3] The congressional choice, as expressed in the Private Express Statutes, was to retain in the United States an exclusive and monopolistic authority over the delivery of letters. The question is whether that determination was "necessary and proper."

The scope of the necessary and proper clause was indelibly sketched in *McCulloch* v. *Maryland*, 4 Wheat. 316 (1819) where Chief Justice Marshall gave a broad interpretation to that clause in upholding congressional action under the commerce clause:

> We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

4 Wheat. at 421 (footnote omitted).[4]

[3]United States Constitution, Art. I, § 8, cl. 18 provides, "The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers . . . ."

There is nothing novel or unprecedented in the governmental monopoly.[5] While we need not demonstrate that today's mail service is the inevitable outgrowth of 4,000 years of postal history commencing in Egypt and Assyria, see C. Scheele, Neither Snow, Nor Rain . . . The Story of the United States Mails 2-10 (1970), it has been noted that private industry could not have attempted to supply the postal requirements of a frontier nation. See W. Rich, The History of the United States Post Office to the Year 1829 at 91-110 (1924). Congress certainly could have determined that something less than a federal monopoly would allow the continuance of an effective postal system. However, the

[4]In *McCulloch* v. *Maryland*, *supra*, 4 Wheat. at 417, Chief Justice Marshall referred to the power of Congress to establish post offices and post roads: "This power is executed, by the single act of making the establishment . . . . It may be said, with some plausibility, that the right to carry the mail, and to punish those who rob it, is not indispensably necessary to the establishment of a post-office and post-road. This right is indeed essential to the beneficial exercise of the power, but not indispensably necessary to its existence."

5 The framers must have had in mind the fact that for 150 years, both in Britain and in the colonies, the postal service had been a monopoly of the government and that it had remained a monopoly under the Articles of Confederation. The first act of the new Congress with respect to the postal establishment confirms this conjecture. The act of September 22, 1789, provided that "the regulations of the post-office shall be the same as they last were under the resolutions and ordinances of the late Congress." And the "late Congress," [i.e., the Confederation's Congress] clearly established a postal monopoly. It is hardly likely that the first Congress could have misconstrued the intent of the Founding Fathers on this point.

J. Haldi & J. Johnston, Jr., Postal Monopoly 7 (1974) (footnote omitted).

wisdom of the choice is not the question for the court, we may only pass on Congress' power to make it.[6]

The constitutionality of the postal monopoly has been challenged rarely and never successfully.[7] Almost a century ago Boyd's City Dispatch employed some 50 carriers who made daily collections and deliveries of letters in the City of New York in competition with the United States Post Office. The proprietor of the private service sought a preliminary injunction to enjoin the Postmaster General from seizing the mail Boyd's City Dispatch was delivering. No attack was made on the constitutionality of the private express statute, U.S. Rev. Stat. § 3982. Rather, plaintiff sought to distinguish her business from those covered by the statute. The court in *Blackham* v. *Gresham*, 16 Fed. 609, 612, (C.C.S.D. N.Y. 1883), in an opinion denying the injunction, stated:

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[6]As the Supreme Court has said in upholding the constitutionality of another government-created monopoly:

> But we think it may be safely affirmed, that the Parliament of Great Britain . . . and the legislative bodies of this country, have from time immemorial to the present day, continued to grant to persons and corporations exclusive privileges — privileges denied to other citizens — privileges which come within any just definition of the word monopoly, as much as those now under consideration; and that the power to do this has never been questioned or denied. Nor can it be truthfully denied, that some of the most useful and beneficial enterprises set on foot for the general good, have been made successful by means of these exclusive rights, and could only have been conducted to success in that way.

Slaughter-House Cases, 16 Wall. 36, 66 (1873).

[7]*United States* v. *Black*, 569 F.2d 1111 (10th Cir.), cert. denied, ____U.S.____, 46 U.S.L.W. 3601 (Mar. 28, 1978); *United States* v. *Thompson*, 28 F. Cas. 97 (D. Mass. 1846) (No. 16,489); *United States* v. *Hall*, 26 F. Cas. 75 (C.C.E.D. Pa. 1844) (No. 15,281).

> As pointed out by the attorney general of the United States in 1858, (9 Op. 161) "the business of carrying letters and other mail matter belongs *exclusively* to the government; and in cities and the large towns letter carriers are as much part of the system as the transportation of the mails from one office to another." If private agencies can be established, the income of the government may be so reduced that economy might demand a discontinuance of the system; and thus the business which it is the right and duty of the government to conduct for the interest of all, and on such terms that all may avail themselves of it with advantage, may be handed over to individuals or corporations who will conduct it with the sole view of making money, and who may find it for their profit to exclude localities or classes from the benefit of the service. (Emphasis supplied.)

The most recent opinion in point is *United States* v. *Black*, 569 F.2d 1111 (10th Cir.), cert. denied, ____U.S.____, 46 U.S.L.W. 3601 (Mar. 28, 1978). In *Black* the defendants operated a private express conveying letters between the cities of Pittsburgh and Frontenac in the State of Kansas. The defendants admitted that they violated 18 U.S.C. § 1696 but in defense claimed that the statute was unconstitutional. The court held that the postal monopoly was constitutional because it was a valid exercise by Congress of the power granted it by Art. I, § 8. This case is indistinguishable from the present appeal.

We conclude that the postal power, in conjunction with the necessary and proper clause, as interpreted by Chief Justice Marshall in *McCulloch*, authorizes Congress to exercise its power to the utmost extent. The monopoly which Congress created is an appropriate and plainly adapted means of providing postal service beneficial to the citizenry at large. Consequently, the Private Express Statutes are constitutional.

II

Appellants' remaining constitutional arguments are even less persuasive. They rely upon the Tenth Amendment which provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

However, the postal power is a delegated power and, as we have found under the necessary and proper clause, in determining to occupy the field exclusively in the conveyance of letters, Congress was not exceeding its powers. As the Court stated in *Case* v. *Bowles*, 327 U.S. 92, 102 (1946):

> Since the decision in *McCulloch* v. *Maryland*, 4 Wheat. 316, 420, it has seldom if ever been doubted that Congress has power in order to attain a legitimate end — that is, to accomplish the full purpose of a granted authority — to use all appropriate means plainly adapted to that end, unless inconsistent with other parts of the Constitution. And we have said, that the Tenth Amendment "does not operate as a limitation upon the powers, express or implied, delegated to the national government." (Footnote omitted.)

Since we have decided the creation of a postal monopoly is a proper exercise of power, the Tenth Amendment argument adds nothing of substance to the constitutional issue here, particularly since no threat to state sovereignty is involved. See *National League of Cities* v. *Usery*, 426 U.S. 833, 842-43 (1976); Tribe, Unraveling *National League of Cities:* The New Federalism and Affirmative Rights to Essential Government Services, 90 Harv. L. Rev. 1065, 1067 n.17 (1977).[8]

[8]Appellants have asserted that the postal power is analogous to the taxing power, which is exercised simultaneously by both the federal government and the individual states. This analogy is patently false. The Constitution provides for a system of dual sovereignties; the power to tax is necessary to the survival of the federal government and the states. History demonstrates that the state can survive without running a postal service.

Appellants further urge that by permitting the Postal Service to define letters or packets, see 39 U.S.C. § 401(2); 39 C.F.R. § 310.1, Congress has improperly delegated the legislative authority vested exclusively in it by Art. I, § 1 in violation of the separation of powers doctrine.[9] The legislature has prescribed the general powers of the Postal Service in 39 U.S.C. § 401, including the power "to adopt, amend and repeal such rules and regulations as it deems necessary" in order "to maintain an efficient system of collecting, sorting and delivering the mail" as called for in 39 U.S.C. § 403(b)(2). "Broad rule-making authority must be allowed a federal agency such as the postal service whose activities are national in scope and are geared to meet varied conditions and circumstances throughout the country." *Rockville Reminder, Inc.* v. *United States Postal Service*, 350 F.Supp. 590, 593 (D. Conn. 1972), aff'd, 480 F.2d 4 (2d Cir. 1973).

The only authorities cited by appellants for their argument on this point are *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935) and *Panama Rfg. Co.* v. *Ryan*, 293 U.S. 388 (1935). These were the "only two cases in all American history" which held congressional delegations to public authorities invalid. K. Davis, Administrative Law Text 26 (3d ed. 1972). "Both . . . cases dealt with delegation of a power to make federal crimes of acts that never had been such before and to devise novel rules of law in a field in which there had been no settled law or custom. [*Schechter*] also involved delegation to private groups as well as to public authorities." They were so distinguished by Mr. Justice Jackson in *Fahey* v. *Mallonee*, 332 U.S. 245, 249 (1947). That distinction is valid here.

[9]See generally A. Vanderbilt, The Doctrine of Separation of Powers and Its President Day Significance (1963).

In any event, as Mr. Justice Marshall commented in his dissent in *National Cable Television Ass'n* v. *United States*, 415 U.S. 336, 352-53 (1974):

> The notion that the Constitution narrowly confines the power of Congress to delegate authority to administrative agencies, which was briefly in vogue in the 1930's, has been virtually abandoned by the Court for all practical purposes, at least in the absence of a delegation creating "the danger of overbroad, unauthorized, and arbitrary application of criminal sanctions in an area of [constitutionally] protected freedoms" .... (Footnote and citation omitted.)

There is no palpable abuse here and no congressional abdication. On the contrary, the authority and necessity for USPS to define "letters" in view of the myriad methods and modes of communication which presently exist is obvious. Thus, the delegation is constitutional.

Finally, the appellants also claim that since the postal monopoly only encompasses letter mail and permits private competition in the delivery of non-letter mail (e.g., fourth class mail parcels) there is a violation of their Fifth Amendment Equal Protection rights.[10] No authority at all is cited that supports this proposition. As the Supreme Court has often stated, "A classification 'must be reasonable, not artitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that *all persons similarly circumstanced shall be treated alike.*'" *Johnson* v. *Robison*, 415 U.S. 361, 374-75 (1974) (citation omitted;

[10]Although the Fifth Amendment unlike the Fourteenth does not have an equal protection clause, the Court has held that the due process clause of the Fifth Amendment prohibits federal action if the same action taken by a state would be proscribed under the Fourteenth Amendment. *Bolling* v. *Sharpe*, 347 U.S. 497 (1954).

emphasis supplied). But here the classification is not directed against persons, rather it is based upon types of mail. The Brennans are in no different posture than any citizen who decides to carry letters in violation of the statute. Obviously, the distinction between types of mail is not invidious. No fundamental rights are involved. The reason for the classification is obvious and rational. The carriage of letters in selected areas is highly profitable compared to the carriage of bulky materials. This permits a subsidy of sorts to those services which inevitably lose money. The national system requires that distinctions based upon the character of the business be made. *Blackham* v. *Gresham*, *supra*, 16 Fed. at 612. It is the task of Congress and the agency to make the classification, not the courts. See *McGowan* v. *Maryland*, 366 U.S. 420 (1961); *Williamson* v. *v. Lee Optical Co.*, 348 U.S. 483 (1955).

We conclude that the appellants have utterly failed to establish the unconstitutionality of the Private Express Statutes on any basis. While American citizens may properly complain about the cost or inefficiency of mail service, this hardly raises a matter of constitutional proportions. It is a matter for the Congress and not the courts.[11]

[11]In reaching our conclusion, we do not overlook the paper of Lysander Spooner on "The Unconstitutionality of the Laws of Congress Prohibiting Private Mails", published in 1844 on behalf of the American Letter Mail Company, an organization which sought to establish mails and post offices in competition with those of Congress. Lysander, in addition to his legal arguments, naturally took a Spartan approach suggesting that the expense of the Postal Service, then $12,000 per day, be used as a fund to retire the existing establishment on an annual pension. This compensation was to be paid to the postal employees for "simply getting out of the way of private enterprize [sic]." Id. at 24. He argued:

> Private enterprise has always the most active physical powers, and the most ingenious mental ones. It is constantly increasing its speed, and simplifying and cheapening its operations. But government functionaries, secure in the enjoyment of warm nests, large salaries,

Footnote continued on next page—

Whatever judicial authority we have been referred to or have unearthed supports the proposition that there is no constitutional infirmity in the federal monopoly over the conveyance of letters. The appellants are keenly aware of the absence of any decision suggesting that the Private Express Statutes are unconstitutional. They suggest that on original analysis this court, "attempt the grave and delicate responsibility of pronouncing these statutes void." *Blackham* v. *Gresham, supra,* 16 Fed. at 612.[12] However, as Mr. Justice Frankfurter aptly commented in *Romero* v. *International Terminal Operating Co.,* 358 U.S. 354, 370-71 (1959):

—Footnote continued from preceding page

> official honors and power, and presidential smiles — all of which they are sure of so long as they are the partisans of the President — feel few quickening impulses to labor, and are altogether too independent and dignified personages to move at the speed that commercial interests require. They take office to enjoy its honors and emoluments, not to get their living by the sweat of their brows. They are too well satisfied with their own conditions, to trouble their heads with plans for improving the accustomed modes of doing the business of their departments — to [sic] wise in their own estimation, or too jealous of their assumed superiority, to adopt the suggestions of others — too cowardly to innovate — and too selfish to part with any of their power, or reform the abuses on which they thrive. The consequence is, as we now see, that when a cumbrous, clumsy, expensive and dilatory government system is once established, it is nearly impossible to modify or materially improve it. Opening the business to rivalry and free competition, is the only way to get rid of the nuisance.

[12]The statutes referred to there were quite clearly §§ 4026 and 3990 of the Revised Statutes of the United States which authorized the postmaster general or his agents to search for and seize matter being transported in violation of law and not the Private Express Statute (then § 3982 of the Revised Statutes).

> The history of archeology is replete with the unearthing of riches buried for centuries. Our legal history does not, however, offer a single archeological discovery of new, revolutionary meaning in reading an old . . . enactment. The presumption is powerful that such a far-reaching, dislocating construction as petitioner would now have us find . . . was not uncovered by judges, lawyers or scholars for [almost two hundred] years because it is not there.

Judgment affirmed and the stay vacated.

APPENDIX B

Judgment, Order and Memorandum Decision of the District Court for the Western District of New York

JUDGMENT ON DECISION BY THE COURT
CIV 32 (7-63)

UNITED STATES DISTRICT COURT
for the
WESTERN DISTRICT OF NEW YORK

UNITED STATES POSTAL SERVICE

vs.

PATRICIA H. BRENNAN and J. PAUL BRENNAN,
doing business as P.H. BRENNAN HAND DELIVERY

Civil Action File No. 77-111
JUDGMENT

This action came on for (hearing) before the Court, Honorable Harld P. Burke, United States District Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that defendants' motion for summary judgment is in all respects denied.

The defendants and each of them, their agents, servants, employees and attorneys, and all persons in active concert or participation with them, are permanently enjoined from; advertising or communicating by any means that they will accept, carry, or deliver letters for compensation, unless such ad-

vertisement or communication contains a specific statement that no letters, as defined in 39 CFR 310.1(a) will be accepted carried, or delivered except and unless the letters are accepted, carried, or delivered in accordance with 39 U.S.C. 601(a)(1)-(6); 18 U.S.C. 1694 and 1696; 39 CFR, Part 320; and from, accepting, carrying, or delivering letters, except in accordance with 39 U.S.C. 601(a)(1)-(6); 18 U.S.C. 1694 and 1696; 39 CFR 310.2(b); 310.3(a)-(e); or 39 CFR, Part 320.

Dated at Buffalo, New York, this 29th day of December, 1977.

JOHN K. ADAMS
Clerk of Court

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES POSTAL SERVICE,
Plaintiff,

vs.

PATRICIA H. BRENNAN and J. PAUL BRENNAN, doing business as P.H. BRENNAN HAND DELIVERY,
Defendants.

CIVIL 77-111

Richard J. Arcara
United States Attorney
Gerald J. Houlihan
Assistant United States Attorney, of counsel for the government.

Harris, Beach, Wilcox, Rubin & Levey
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James M. Hartman & Michael C. Normoyle, of counsel
Attorneys for the defendants

This is an action seeking a permanent injunction against the defendants enjoining them from violating the congressionally granted postal monopoly covering the carriage and delivery of "letter mail". The United States Postal Service is granted the monopoly through the Private Express Statutes, 18 U.S.C. 1693-1699, 1927; 39 U.S.C. 601-606. The defendants have admitted violation of these statutes but challenge their constitutionality. The plaintiff and defendants have moved for summary judgment.

The defendants contend as follows: The Private Express Statutes, as enacted and implemented, are unconstitutional because they exceed the power of Congress to deal with the nations mail; the Private Express Statutes violate the Tenth Amendment to the Constitution of the United States because they deny to the states and to the people that portion of a concurrent power which is inherently reserved to them; the Private Express Statutes violate the Fifth Amendment to the Constitution because their present implementation involved arbitrary and discriminatory legislative classifications which have no rational relationship to a valid governmental goal; the Private Express Statutes are unconstitutional because they allow for the exaction of an unauthorized and unlawful tax from the users of first-class mail service.

There is no merit to any of the contentions asserted by the defendants.

The Private Express Statutes are a valid exercise of congressional power.

The defendants' motion for summary judgment is in all respects denied.

The government's motion for summary judgment is granted in all respects. Ex Parte Jackson, 96 U.S. 727 (1877); In re Rapier, 143 U.S. 110, 134 (1892); Williams vs. Wells Fargo, 177 Fed. 352 (8 cir. 1910); Transcontinental and Western Airlines, Inc. vs. Farley, 71 F.2d 288 (2 cir. 1934, cert. den. 293 U.S. 603); National Ass'n. of Letter Carriers vs. Independent Postal Systems, 470 F.2d 265 (10 cir. 1972).

The defendants and each of them, their agents, servants, employees and attorneys, and all persons in active concert or participation with them, are permanently enjoined from; advertising or communicating by any means that they will accept, carry, or deliver letters for compensation, unless such advertisement or communication contains a specific statement that no letters, as defined in 39 CFR 310.1(a), will be accepted, carried, or delivered except and unless the letters are accepted, carried, or delivered in accordance with 39 U.S.C. 601(a)(1)-(6); 18 U.S.C. 1694 and 1696; 39 CFR, Part 320; and from, accepting, carrying, or delivering letters, except in accordance with 39 U.S.C. 601(a)(1)-(6); 18 U.S.C. 1694 and 1696; 39 CFR 310.2(b); 310.3(a)-(e); or 39 CFR, Part 320.

ALL OF THE ABOVE IS SO ORDERED.

/s/ Harold P. Burke
HAROLD P. BURKE
United States District Judge

December 27, 1977.

APPENDIX C

Order of the United States Court of Appeals for the Second Circuit Denying Petition for Rehearing and for Hearing *En Banc**

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the eighteenth day of July, one thousand nine hundred and seventy-eight.

Present:

HON. HENRY J. FRIENDLY
HON. WILLIAM H. MULLIGAN
HON. THOMAS J. MESKILL

Circuit Judges.

UNITED STATES POSTAL SERVICE,

Plaintiff-Appellee,

vs.

BRENNAN, Patricia H., BRENNAN, J. Paul d/b/a P.H. BRENNAN Hand Delivery,

Defendants-Appellants.

Docket No. 78-6002

A petition for a rehearing having been filed herein by counsel for the Defendant-Appellants.

*The copies of this Order which was received by Counsel for Petitioners contained a Court of Appeals stamp which indicated that the Order was filed on July 20, 1978.

Appendix C — Order of the United States Court of Appeals for the Second Circuit Dening Petition for Rehearing and for Hearing En Banc

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

A. Daniel Fusaro
Clerk

By /s/ SARA PIOVIA
Sara Piovia
Deputy Clerk

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

As a stated term of the United States Court of Appeals, in and for the Second Circuit, held a the United States Court House, in the City of New York, on the eighteenth day of July, one thousand nine hundred and seventy-eight.

UNITED STATES POSTAL SERVICE,

Plaintiff-Appellee,

—against—

BRENNAN, Patricia H., BRENNAN, J. Paul, d/b/a P.H. BRENNAN Hand Delivery,

Defendant-Appellant.

DOCKET NO. 78-6002

A petition for rehearing containing a suggestion that the action be reheard en banc having been filed herein by counsel for

the defendant-appellant, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

/s/ IRVING R. KAUFMAN
Irving R. Kaufman,
Chief Judge

APPENDIX D

Decision of Justice Thurgood Marshall Denying Petitioners' Application For a Stay

SUPREME COURT OF THE UNITED STATES

No. A-152

Patricia H. Brennan and J. Paul Brennan, d/b/a P.H. Brennan Hand Delivery, Petitioners,

v.

United States Postal Service.

[August 11, 1978]

On Application for Stay.

Mr. Justice Marshall, Circuit Justice.

Patricia H. Brennan and J. Paul Brennan have applied to me for a stay of the judgment of the Second Circuit Court of Appeals pending the filing and disposition by this Court of their petition for a writ of certiorari. Applicants operate a hand delivery mail service in Rochester, N.Y. The United States Postal Service (USPS) brought suit in the Western District of New York to enjoin operation of this service on the ground that the Private Express Statutes, 39 U.S.C. §§ 601-606 and 18 U.S.C. §§ 1693-1699, proscribe private carriage and delivery of "letters and packets." Applicants concede that the Private Express Statutes do indeed prohibit their activities, but they challenge the prohibition principally on the basis that the Constitution does not confer upon Congress exclusive power to operate a postal

system.[1] The District Court rejected the challenge and permanently enjoined further violations. The Court of Appeals affirmed, denied motions for rehearing and rehearing en banc, and refused to stay its judgment pending disposition of a petition for a writ of certiorari. Applicants invoke the jurisdiction of this Court under 28 U.S.C. § 2101 (f).

The argument applicants press here is that Congress exceeded its powers by granting the USPS a monopoly over the conveyance of letter mail. Article I, § 8, cl. 7 of the Constitution provides that "Congress shall have Power . . . To establish Post Offices and post Roads." Nothing in this language or in any other provision of the Constitution, applicants submit, implies that the postal power is invested *exclusively* in the Legislative Branch. Although Congress has authority under Art. I, § 8, cl. 18, to make such laws as are "necessary and proper" for carrying out its delegated functions, applicants argue that this provision does not permit it to convert a nonexclusive power into an exclusive one.

The well-established criteria for granting a stay are "that the applicants must show 'a balance of hardships in their favor' *and* that the issue is so substantial that four Justices of this Court would likely vote to grant a writ of certiorari." *New York Times* v. *Jascalevich*, ____U.S.____, 47 U.S.L.W.____, ____ (Aug. 4, 1978). I cannot conceive that four Justices would agree to review the Court of Appeals' ruling on the argument advanced here. That argument rests on the tenuous premise that the Framers

[1]They contend also that the legislation violates the Tenth Amendment because it denies to the States and to the people a concurrent power reserved to them, that Congress improperly delegated to the USPS the power to define "letters and packets," and that the extension of the postal monopoly only to letter mail arbitrarily discriminates against their business. Applicants intend to pursue these challenges in their petition for certiorari, but do not elaborate on them here.

intended to create categories of exclusive and nonexclusive powers so inviolable that a subsequent Congress could not determine that a government monopoly over letter mail was "necessary and proper" to prevent private carriers from securing all of the profitable postal routes and relegating to the USPS the unprofitable ones. Applicants have presented no convincing evidence of such an intent, and such a miserly construction of congressional power transgresses principles of constitutional adjudication settled since *M'Culloch* v. *Maryland*, 4 Wheat. 316 (1819). As Chief Justice Marshall stated there, "the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people." 4 Wheat., at 421.

Moreover, long historical practice counsels against reviewing this novel constitutional claim. The Private Express Statutes have existed in one form or another since passed by the First Congress in 1792,[2] and their constitutionality has never been successfully challenged. While such longevity does not ensure that a statute is constitutional, it is certainly probative here of whether four Justices would vote to hear the merits of applicants' case. Cf. *Myers* v. *United States*, 272 U.S. 52, 175 (1926). This Court's recent refusal to review the Tenth Circuit's decision upholding the Private Express Statutes, *United States* v. *Black*, 569 F.2d 1111, cert. denied, ____U.S.____, 46 U.S.L.W. 3601 (Mar. 28, 1978), and the absence of any conflict among the circuits on this point also indicate that applicants have not satisfied the criteria for the granting of a stay.

Accordingly, the application is denied.

[2]Indeed, the 1792 Act continued in effect a statute of the Continental Congress that had created a postal monopoly. Act of Feb. 20, 1792, 1 State 232, 236, adopting Act of Oct. 18, 1782, 23 J.C.C. 672-673.

APPENDIX E

Constitutional, Statutory and Regulatory Provisions

A. *United States Constitution:*

Article I, Section 8:

Section 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings; — And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Article I, Section 10:

Section. 10. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder,

ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and al! such Laws shall be subject to the Revision and Controul of the Congress.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; not shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

THE PRIVATE EXPRESS STATUTES

(39 U.S.C. §§601-606 AND 18 U.S.C. §§1693-1699)

39 U.S.C. §§ 601-606:

§ 601. Letters carried out of the mail

(a) A letter may be carried out of the mails when—

(1) it is enclosed in an envelope;

(2) the amount of postage which would have been charged on the letter if it had been sent by mail is paid by stamps, or postage meter stamps, on the envelope;

(3) the envelope is properly addressed;

(4) the envelope is so sealed that the letter cannot be taken from it without defacing the envelope;

(5) any stamps on the envelope are canceled in ink by the sender; and

(6) the date of the letter, of its transmission or receipt by the carrier is endorsed on the envelope in ink.

(b) The Postal Service may suspend the operation of any part of this section upon any mail route where the public interest requires the suspension.

§ 602. Foreign letters out of the mails

(a) Except as provided in section 601 of this title, the master of a vessel departing from the United States for foreign ports may not recieve on board or transport any letter which originated in the United States that—

(1) has not been regularly received from a United States post office; or

(2) does not relate to the cargo of the vessel.

(b) The officer of the port empowered to grant clearances shall require from the master of such a vessel, as a condition of clearance, an oath that he does not have under his care or control, and will not receive or transport, any letter contrary to the provisions of this section.

(c) Except as provided in section 1699 of title 18, the master of a vessel arriving at a port of the United States carrying letters not regularly in the mails shall deposit them in the post office at the port of arrival.

§ 603. Searches authorized

The Postal Service may authorize any officer or employee of the Postal Service to make searches for mail matter transported in violation of law. When the authorized officer has reason to believe that mailable matter transported contrary to law may be found therein, he may open and search any—

(1) vehicle passing, or having lately passed, from a place at which there is a post office of the United States;

(2) article being, or having lately been, in the vehicle; or

(3) store or office, other than a dwelling house, used or occupied by a common carrier or transportation company, in which an article may be contained.

§ 604. Seizing and detaining letters

An officer or employee of the Postal Service performing duties related to the inspection of postal matters, a customs officer, or United States marshal or his deputy, may seize at any time, letters and bags, packets, or parcels containing letters which are being carried contrary to law on board any vessel or on any post road. The officer or employee who makes the seizure shall convey the articles seized to the nearest post office, or, by direction of the Postal Service or the Secretary of the Treasury, he may

detain them until 2 months after the final determination of all suits and proceedings which may be brought within 6 months after the seizure against any person for sending or carrying the letters.

§ 605. Searching vessels for letters

An officer or employee of the Postal Service performing duties related to the inspection of postal matters, when instructed by the Postal Service to make examinations and seizures, and any customs officer without special instructions shall search vessels for letters which may be on board, or which may have been conveyed contrary to law.

§ 606. Disposition of seized mail

Every package or parcel seized by an officer or employee of the Postal Service performing duties related to the inspection of postal matters, a customs officer, or United States marshal or his deputies, in which a letter is unlawfully concealed, shall be forfeited to the United States. The same proceedings may be used to enforce forfeitures as are authorized in respect of goods, wares, and merchandise forfeited for violation of the revenue laws. Laws for the benefit and protection of customs officers making seizures for violating revenue laws apply to officers and employees making seizures for violating the postal laws.

18 U.S.C. §§1693-1699:

§ 1693. Carriage of mail generally

Whoever, being concerned in carrying the mail, collects, receives, or carries any letter or packet, contrary to law, shall be fined not more than $50 or imprisoned not more than thirty days, or both.

§ 1694. Carriage of matter out of mail over post routes

Whoever, having charge or control of any conveyance operating by land, air, or water, which regularly performs trips at stated periods on any post route, or from one place to another between which the mail is regularly carried, carries, otherwise than in the mail, any letters or packets, except such as relate to some part of the cargo of such conveyance, or to the current business of the carrier, or to some article carried at the same time by the same conveyance, shall, except as otherwise provided by law, be fined not more than $50.

§ 1695. Carriage of matter out of mail on vessels

Whoever carries any letter or packet on board any vessel which carries the mail, otherwise than in such mail, shall, except as otherwise provided by law, be fined not more than $50 or imprisoned not more than thirty days, or both.

§ 1696. Private express for letters and packets

(a) Whoever establishes any private express for the conveyance of letters or packets, or in any manner causes or provides for the conveyance of the same by regular trips or at stated periods over any post route which is or may be established by law, or from any city, town, or place to any other city, town, or place, between which the mail is regularly carried, shall be fined not more than $500 or imprisoned not more than six months, or both.

This section shall not prohibit any person from receiving and delivering to the nearest post office, postal car, or other authorized depository for mail matter any mail matter properly stamped.

(b) Whoever transmits by private express or other unlawful means, or delivers to any agent thereof, or deposits at any appointed place, for the purpose of being so transmitted any letter or packet, shall be fined not more than $50.

(c) This chapter shall not prohibit the conveyance or transmission of letters or packets by private hands without compensation, or by special messenger employed for the particular occasion only. Whenever more than twenty-five such letters or packets are conveyed or transmitted by such special messenger, the requirements of section 500 of Title 39, shall be observed as to each piece.

§ 1697. Transportation of persons acting as private express

Whoever, having charge or control of any conveyance operating by land, air, or water, knowingly conveys or knowingly permits the conveyance of any person acting or employed as a private express for the conveyance of letters or packets, and actually in possession of the same for the purpose of conveying them contrary to law, shall be fined not more than $150.

§ 1698. Prompt delivery of mail from vessel

Whoever, having charge or control of any vessel passing between ports or places in the United States, and arriving at any such port or place where there is a post office, fails to deliver to the postmaster or at the post office, within three hours after his arrival, if in the daytime, and if at night, within two hours after the next sunrise, all letters and packages brought by him or within his power or control and not relating to the cargo, addressed to or destined for such port or place, shall be fined not more than $150.

For each letter or package so delivered he shall receive two cents unless the same is carried under contract.

§ 1699. Certification of delivery from vessel

No vessel arriving within a port or collection district of the United States shall be allowed to make entry or break bulk until all letters on board are delivered to the nearest post office, except where waybilled for discharge at other ports in the United States at which the vessel is scheduled to call and the Postmaster General does not determine that unreasonable delay in the mails will occur, and the master or other person having charge or control thereof has signed and sworn to the following declaration before the collector or other proper customs officer:

I, A. B., master _____, of the _____, arriving from _____, and now lying in the port of _____, do solemnly swear (or affirm) that I have to the best of my knowledge and belief delivered to the post office at _____ every letter and every bag, packet, or parcel of letters on board the said vessel during her last voyage, or in my possession or under my power or control, except where waybilled for discharge at other ports in the United States at which the said vessel is scheduled to call and which the Postmaster General has not determined will be unreasonably delayed by remaining on board the said vessel for delivery at such ports.

Whoever, being the master or other person having charge or control of such vessel, breaks bulk before he has arranged for such delivery or onward carriage, shall be fined not more than $100.

(39 C.F.R. PARTS 310 AND 320)

PART 310 – ENFORCEMENT OF THE PRIVATE EXPRESS STATUTES

§ 310.1 Definitions.

(a) "Letter" is a message directed to a specific person or address and recorded in or on a tangible object, subject to the following:

(1) Tangible objects used for letters include, but are not limited to, paper (including paper in sheet or card form), recording disks, and magnetic tapes.

(2) "Message" means any information or intelligence that can be recorded as described in paragraph (a) (4) of this section.

(3) A message is directed to a "specific person or address" when, for example, it is directed to a named or identifiable individual, organization, or official, or when it is directed to a specific place.

(4) Methods by which messages are recorded on tangible objects include, but are not limited to, the use of written or printed characters, drawing, holes, or orientations of magnetic particles in a manner having a predetermined significance.

(5) Whether a tangible object bears a message is to be determined on an objective basis without regard to the intended or actual use made of the object sent.

(6) Identical messages directed to more than one specific person or address or separately directed to the same person or address constitute separate letters.

(7) The following are not letters within the meaning of these regulations:[1]

(i) Telegrams.

(ii) Checks, drafts, promissory notes, bonds, other negotiable and non-negotiable financial instruments, stock certificates, other securities, insurance policies, and title policies when shipped to, from, or between financial institutions.

(A) As used above, "checks" and "drafts" include documents intrinsically related to and regularly accompanying the movement of checks or drafts within the banking system. "Checks" do not include materials accompanying the movement of checks to financial institutions from persons who are not financial institutions, or vice versa, except such materials as would qualify under § 310.3 (a) if "checks" were treated as cargo. Specifically, for example, "checks" do not include bank statements sent to depositors showing deposits, debits, and account balances.

(B) As used above, "financial institutions" means:

(1) As to checks and drafts: banks, savings banks, savings and loan institutions, credit unions, and their offices, affiliates, and facilities.

(2) As to other instruments: institutions performing functions involving the bulk generation, clearance, and transfer of such instruments.

(iii) Abstracts of title, mortgages, deeds, leases, articles of incorporation, papers filed in lawsuits or formal quasi-judicial proceedings, and orders of court.

[1]Several of the items enumerated in this paragraph (a)(7) do not self-evidently lie outside of the definition of "letter". To the extent, however, that there is any question whether these items may properly be excluded by definition, the Postal Service has determined by adoption of these regulations that the restrictions of the Private Express Statutes are suspended pursuant to 39 U.S.C. 601(b).

(iv) Newspapers and periodicals.

(v) Books and catalogs consisting of 24 or more bound pages with at least 22 printed, and telephone directories.

(vi) Identical letters sent in bulk to a single address by a printer or other supplier of letters for third persons.

(vii) Letters sent in bulk to or from storage or to destruction or as part of a household or business relocation.

(b) "Packet" means two or more letters under one cover or otherwise bound together. As used in these regulations, unless the context otherwise requires, "letter" or "letters" includes "packet" or "packets".

(c) "Person" means an individual, corporation, association, partnership, governmental agency, or other legal entity.

(d) "Post routes" are routes on which mail is carried by the Postal Service, and includes post roads as defined in 39 U.S.C. 5003, as follows:

(1) The waters of the United States, during the time the mail is carried thereon;

(2) Railroads or parts of railroads and air routes in operation;

(3) Canals, during the time the mail is carried thereon;

(4) Public roads, highways, and toll roads during the time the mail is carried thereon; and

(5) Letter-carrier routes established for the collection and delivery of mail.

(e) "Private carriage", "private carrier", and terms of similar import used in connection with the Private Express Statutes or these regulations mean carriage by anyone other than the Postal Service, regardless of any meaning ascribed to similar terms under other bodies of law or regulation.

(f) The "Private Express Statutes" are set forth in 18 U.S.C. 1693-1699 and 1724 and 39 U.S.C. 601-606 (1970).

§ 310.2 Unlawful carriage of letters.

(a) It is generally unlawful under the Private Express Statutes for any person other than the Postal Service in any manner to send or carry a letter on a post route or in any manner to cause or assist such activity. Violation may result in injunction, fine or imprisonment or both and payment of postage lost as a result of the illegal activity (see § 310.5).

(b) Activity described in paragraph (a) of this section is lawful with respect to a letter if —

(1) It is enclused in an envelope or other suitable cover;

(2) The amount of postage which would have been charged on the letter if it had been sent through the Postal Service is paid by stamps, or postage meter stamps, on the cover or by other methods approved by the Postal Service;

(3) The name and address of the person for whom the letter is intended appear on the cover;

(4) The cover is so sealed that the letter cannot be taken from it without defacing the cover;

(5) Any stamps on the cover are canceled in ink by the sender; and

(6) The date of the letter, or of its transmission or receipt by the carrier, is endorsed on the cover in ink by the sender or carrier, as appropriate.

(c) The Postal Service may suspend the operation of any part of paragraph (b) of this section where the public interest requires the suspension.

(d) Activity described in paragraph (a) of this section is permitted with respect to letters which—

(1) Relate to some part of the cargo of, or to some article carried at the same time by, the conveyance carrying it (see § 310.3(a));

(2) Are sent by or addressed to the carrier (see § 310.3(b));

(3) Are conveyed or transmitted without compensation (see § 310.3(c));

(4) Are conveyed or transmitted by special messenger employed for the particular occasion only, provided that not more than twenty-five such letters are conveyed or transmitted by such special messenger (see § 310.3(d)); or

(5) Are carried prior or subsequent to mailing (see § 310.3(e)).

§ 310.3 Exceptions.

(a) *Cargo.* The sending or carrying of letters is permissible if they accompany and relate exclusively to some part of the cargo.

(b) *Letters of the carrier.* (1) The sending or carrying of letters is permissible if they are sent by or addressed to the individual carrying them or if they are sent by or addressed to an officer or employee of a carrier on the current business of the carrier (i.e., in his capacity as an officer or employee).

(2) The fact that the individual performing the carriage may be an officer or employee of the carrier for certain purposes does not necessarily mean that he is an officer or employee for purposes of this exception. The following factors bear on qualification for the exception: The carrying employee is employed for a substantial time, if not full-time (letters must not be privately carried by casual employees); the carrying employee carries no matter for other senders; the carrying employee is a regular salaried employee and shares in all privileges enjoyed by other regular employees (including employees not engaged primarily in the letter-carrying function), including but not

limited to salary, annual vacation time, absence allowed for illness, health benefits, workmen's compensation insurance, and retirement benefits.

(3) Separately incorporated carriers are separate entities for purposes of this exception, regardless of any subsidiary, ownership, or leasing arrangement. When, however, two concerns jointly operate an enterprise with joint employees and share directly in its revenues and expenses either of the concerns may carry the letters of the joint enterprise.

(c) *Private hands without compensation.* The sending or carrying of letters is permissible if no charge for carriage is made by the carrier. However, a person engaged in the transportation of goods or persons for hire does not fall within the exception merely by carrying letters free of charge for customers whom he does charge for the carriage of goods or persons.

(d) *Special messenger.* (1) The use of a special messenger employed for the particular occasion only is permissible to transmit letters if not more than twenty-five letters are involved. The permission granted under this exception is restricted to use of messenger service on an infrequent, irregular basis by the sender or addressee of the message.

(2) A special messenger is a person who, at the request of either the sender or the addressee, picks up a letter from the sender's home or place of business and carries it to the addressees home or place of business, but a messenger or carrier operating regularly between fixed points is not a special messenger.

(e) *Carriage prior or subsequent to mailing.* (1) The private sending or carrying of unopened letters which enter the mail stream at some point between their origin and destination is permissible. The origin of a letter is the residence or place of business of the sender; the destination of a letter is the residence or place of business of the addressee.

(2) Examples of permitted activity are the pickup and carriage of letters which are delivered to post offices for mailing; the pickup and carriage of letters at post offices for delivery to addressees; and the bulk shipment of individually addressed letters ultimately carried by the Postal Service.

§ 310.4 Responsibility of carriers.

Private carriers are cautioned to make sure that their carriage of matter is lawful within the definition, exceptions, suspension, and conditions contained in this part and in Part 320 of this chapter. They should take reasonable measures to inform their customers of the contents of these regulations so that only proper matter is tendered to them for carriage. Carriers should desist from carrying any matter when the form of shipment, identity of sender or recipient, or any other information reasonably accessible to them indicates that matter tendered to them for carriage is not proper under these regulations.

§ 310.5 Payment of postage on violation.

(a) Upon discovery of activity made unlawful by the Private Express Statutes, the Postal Service may require any person or persons who engage in, cause, or assist such activity to pay an amount or amounts not exceeding the total postage to which it would have been entitled had it carried the letters between their origin and destination.

(b) The amount equal to postage will be due and payable not later than 15 days after receipt of formal demand from the Inspection Service unless an appeal is taken to the Judicial Officer Department in accordance with rules of procedure set out in Part 959 of this chapter.

(c) Refusal to pay an unappealed demand or a demand that becomes final after appeal will subject the violator to civil suit by the Postal Service to collect the amount equal to postage.

(d) The payment of amounts equal to postage on violation shall in no way limit other actions to enforce the Private Express Statutes by civil or criminal proceedings.

§ 310.6 Advisory opinions.

An advisory opinion on any question arising under this part and Part 320 may be obtained by writing the Assistant General Counsel, Opinions Division, United States Postal Service, Washington, D.C. 20260. Final opinions will be available for inspection by the public in the Library of the United States Postal Service, and copies of individual opinions may be obtained upon payment of charges for duplicating services.

§ 310.7 Amendment of regulations.

Amendments of the regulations in this part and in Part 320 may be made only in accordance with the rulemaking provisions of the Administrative Procedure Act.

PART 320 — SUSPENSION OF THE PRIVATE EXPRESS STATUTES

§ 320.1 Definitions.

The definitions in § 310.1 apply to Part 320 as well.[1]

§ 320.2 Suspension.

(a) The operation of 39 U.S.C. 601(a) (1) through (6) and § 310.2(b) (1) through (6) of this chapter is suspended on all post

[1]Several of the items enumerated in § 310.1(a) (7) do not self-evidently lie outside of the definition of "letter". To the extent, however, that there is any question whether these items may properly be excluded by definition, the Postal Service has determined by adoption of these regulations that the restrictions of the Private Express Statutes are suspended pursuant to 39 U.S.C. 601(b).

routes for data processing materials as defined in paragraph (b) on the terms detailed in that paragraph. The effect of this suspension is to allow any person to send or carry data processing materials as so defined between places served by the Postal Service without paying postage or meeting any other conditions of 39 U.S.C. 601(a) and § 310.2(b) of this chapter.

(b) The suspension referred to in paragraph (a) of this section is for data processing materials conveyed to a data processing center, or back from the data processing center to the address of the office originating the data processing materials, if transmission is completed within 12 hours or by noon of the addressee's next business day, and if data processing work is commenced on any such material sent to a data processing center within 36 hours of receipt at the center. The "addressee's next business day" means the first calendar day, stated in his local time, on which he conducts business, following the calendar day of dispatch, stated in the sender's local time. For purposes of this suspension, "data processing" means electro-mechanical or electronic processing and "data processing materials" includes materials of all types that are ready for immediate data processing or for automatic conversion into a form ready for immediate data processing and the direct output of data processing, but only if they are produced on a regular periodic basis.

(c) For purposes of the time limitations for completion of delivery referred to in paragraph (b) of this section, delivery of shipments between a domestic point and a foreign point shall be deemed to begin at the time materials of foreign origin are received at the international gateway city or end at the time materials of domestic origin leave the international gateway city.

(d) The suspension referred to in paragraphs (a) and (b) of this section may be revoked. No revocation will curtail operations of particular carriers existing at the time of the revocation to a level of operations (in dollar or volume terms, whichever is larger) lower than that antedating the revocation in a particular market served prior to the revocation. Should the suspension be revoked, carriers, as a condition to continuing operations under this subsection, will be required to provide reasonably complete and accurate data to support estimates of past operating levels in particular markets.

§ 320.3 Operations under suspension.

(a) Persons intending to establish or alter operations based on the suspension granted pursuant to § 320.2 shall, as a condition to the right to operate under the suspension, notify the Private Express Liaison Officer, Customer Services Department, United States Postal Service, Washington, D.C. 20260, of their intention to establish such operations not later than the beginning of such operations. Such notification, on a form available from the Private Express Liaison Office, shall include information on the identity and authority of the carrier and the scope of its proposed operations.

(b) Persons operating under the suspension granted pursuant to § 320.2 are responsible for making sure that their carriage of matter under the suspension meets all conditions contained in § 320.2. (See § 310.4.) The containers or covers of any matter carried under the suspension must be made available for examination upon request by a properly identified postal inspector. Carrier records — either in the form of notations on the containers or covers of any matter carried under the suspension granted pursuant to § 320.2 or in the form of records kept by employees of the actual times they make delivery or pickup stops

— must be sufficient to show that the delivery of such matter was completed within the appicable time limitation prescribed in § 320.2. The provisions of this paragraph shall not restrict the Postal Service in the exercise of search powers conferred upon it by law.

(c) The filing of notifications under this section does not relieve the operator of responsibility for assuring that its operations conform to applicable statutes and regulations.

(d) Failure to comply with the notification requirements of this section and carriage of material or other action in violation of other provisions of this Part and of Part 310 are grounds for administrative revocation of the suspension as to a particular carrier for a period of not less than one year, in a proceeding instituted by the General Counsel, following a hearing by the Judicial Officer Department in accordance with the rules of procedure set out in Part 959 of this chapter.

No. 78-653

In the Supreme Court of the United States

OCTOBER TERM, 1978

PATRICA H. BRENNAN AND J. PAUL BREENAN, d/b/a P.H. BRENNAN HAND DELIVERY, PETITIONERS

v.

UNITED STATES POSTAL SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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1. Petitioners operated a private mail delivery service in downtown Rochester, New York. Their service allowed customers, primarily law firms and businesses, to send letters within Rochester for 10 cents apiece, as opposed to the 15 cents charged for first-class letters delivered by the United States Postal Service. Petitioners concede that their delivery service violates the Private Express Statutes, which proscribe the private carriage and delivery of letters. 39 U.S.C. 601-606; 18 U.S.C. 1693-1699.

The Postal Service filed suit against petitioners, seeking an injunction barring them from carrying letter mail. Petitioners argued that the Private Express Statutes exceed the powers granted to Congress in Article 1, Section 8 of the Constitution by conferring a monopoly on letter delivery on the Postal Service.

The district court rejected this argument and enjoined petitioners from carrying any "letters," as that term is defined in 39 C.F.R. 310.1(a).[1]

The court of appeals affirmed and refused to stay the injunction pending disposition of the petition for a writ of certiorari by this Court (Pet. App. A-1 to A-13). The mandate issued from the court of appeals on July 28, 1978, and petitioners then ceased operations. Petitioners applied to this Court for a stay on August 4, 1978. Mr Justice Marshall denied the application on August 11, 1978 (Pet. App. A-21 to A-23).[2]

2. The decision of the court of appeals is correct and does not conflict with any decision of this or any other court.

The postal monopoly of the United States Government is as old as the Nation itself. The First Congress enacted legislation to continue the postal monopoly established by the Continental Congress. Act of February 20, 1792, ch. 7, 1 Stat. 235-236, adopting Act of October 18, 1782, 23

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[1]The applicable regulations exclude a number of items from the definition of "letters," including financial instruments transmitted between financial institutions, 39 C.F.R. 310.1(a) (7)(ii), abstracts of title, mortgages, deeds, leases, articles of incorporation, papers filed in lawsuits, orders of courts, 39 C.F.R. 310.1(a)(7)(iii), newspapers and periodicals, 39 C.F.R. 310.1(a)(7)(iv), and books and catalogs, 39 C.F.R. 310.1(a) (7)(v). Petitioners, in an earlier application to this Court for a stay pending appeal, represented that "[m]uch, if not most of the mail which is carried is not 'letter mail' as that term is defined at 39 C.F.R. 310.1(a)(7), but is in the nature of exempt business transaction mail, abstracts of title, mortgages, and papers filed in lawsuits" (Stay App. 2). The injunction does not affect these items.

[2]Mr. Justice Marshall's opinion analyzed petitioners' principal legal argument and concluded that its premise is "tenuous" (Pet. App. A-22).

Journals of the Continental Congress 672-673 (1782). No court has ever doubted the constitutionality of this legislation, which has been upheld on at least four occasions. See Pet. App. A-6 to A-7, citing, *e.g.*, *United States* v. *Black*, 569 F. 2d 1111 (10th Cir.), cert. denied, 435 U.S. 944 (1978). We rely on the thorough discussion and analysis of the court of appeals.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

DECEMBER 1978

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[3]Petitioners also argue (Pet. 17-23) that the Postal Service's implementing regulations (see note 1, *supra*) deny them equal protection and violate the separation of powers doctrine. The Second Circuit correctly held, however, that the regulations do not create an invidious classification because "the classification is not directed against persons; rather it is based upon types of mail" (Pet. App. A-11). Moreover, the distinctions made are wholly rational. The court of appeals also correctly rejected petitioners' assertion that the regulations are the result of an improper delegation of congressional authority to an executive agency (Pet. App. A-9).

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